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No. 94-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUNDGARDEN, et al.

Petitioners,

vs.

KENNETH O. EIKENBERRY, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, AND VIDEO SOFTWARE DEALERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT

The American Booksellers Foundation For Free Expression, Council For Periodical Distributors Associations, Freedom To Read Foundation, International Periodical Distributors Association, Motion Picture Association of America, National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, and Video Software Dealers of America submit this joint brief urging grant of the petition for certiorari and reversal of that part of the decision below appealed from by petitioners. This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

THE AMICI

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 330 independent local wholesale distributors who distribute over 90% of all magazines in every state of the United States, as well as comic books, paperback books and newspapers.

The Freedom To Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to

include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

The National Association of Recording Merchandisers is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Video Software Dealers Association is a trade association representing the interests of video retailers, distributors and suppliers. It represents more than 4,000 member-companies, including the home video divisions of the major film studios and major video chains such as Blockbuster as well as thousands of independent retailers throughout the United States.

INTEREST OF THE AMICI

Amici's members publish, produce, distribute and sell books, magazines, videos, sound recordings, and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Because *amici's* members include publishers, distributors and booksellers who create, distribute and sell popular and potentially provocative literary, scientific and scholarly books, periodicals and recordings, they are from time to time faced with criminal statutes and ordinances that they believe violate their First Amendment rights. *Amici's* members are law-abiding citizens and do not desire to violate valid constitutional laws. In the face of passage of a law believed to be unconstitutional, under the decision of the Washington Supreme Court members of *amici* are faced with an unworkable dilemma. On the one hand, they could self-censor material they believe to be unconstitutional, interrupt their business operations and restrict distribution of material to which the public is constitutionally entitled. On the other hand, they could affirmatively seek arrest, with the related community opprobrium, in order to challenge what they believe to be unconstitutional statutes. They should not be forced to this unenviable choice.

Thus, in the past *amici* or their members have brought numerous actions in both federal and state courts prior to enforcement against them or others under 42 U.S.C. § 1983 to assert such unconstitutionality of newly passed invalid laws.

See, e.g., Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Hudnut v. American Booksellers Ass'n*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); *Village Books v. Bellingham*, No. C88-1470D, U.S. Dist. Ct., W.D. Wash. (Feb. 9, 1989); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979).

Under the decision below, relief under § 1983 is no longer available in the Washington state courts on the facts of this case. Therefore, even when the unconstitutionality of the legislation is successfully demonstrated, as in this case, plaintiffs cannot recover their legal fees under § 1988.

SUMMARY OF ARGUMENT

The Supreme Court of Washington, exercising jurisdiction under state law, correctly ruled that the challenged statute violated the First Amendment to the U.S. Constitution. The Washington court incorrectly held, however, that it could not grant similar relief under federal law (42 U.S.C. § 1983), and therefore denied successful plaintiffs attorneys' fees under 42 U.S.C. § 1988. Prior to that decision, no court, either state or federal, had held that there is no cause of action under § 1983 to enforce First Amendment rights when the challenge is brought prior to active enforcement of the statute by state officials, even though plaintiffs justifiably fear enforcement. Therefore, the decision below is in direct conflict with the decisions of this Court. *E.g., Virginia v. American Booksellers Ass'n, supra.*

To the contrary, the unconstitutional statute, and plaintiffs' justifiable fear of its enforcement, casts a chilling effect on plaintiffs' legitimate constitutionally protected activities entitling them to immediate pre-enforcement relief. This Court, as well as lower courts and state supreme courts, have consistently held that where "plaintiffs have . . . an actual and well-founded fear that the law will be enforced against them" and the danger of an unconstitutional statute restricting speech is, "in large measure, one of self-censorship," there is "a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n*, 484 U.S. at 393.

The decision below, by finding no § 1983 violation and denying these successful First Amendment plaintiffs the federal recovery of court awarded attorneys' fees to which they would otherwise be entitled, deprives plaintiffs of an important aspect of this federally-granted relief. Further, the public policy as expressed in §§ 1983 and 1988 demonstrates the importance of awarding recovery of attorneys' fees to persons bringing successful, pre-enforcement constitutional challenges, particularly in the First Amendment area. The alternative would be to require legitimate publishers, booksellers and distributors of constitutionally protected materials to seek arrest and criminal prosecution in order to challenge an unconstitutional statute. The law does not exact this intolerable burden and risk on businesspersons for asserting First Amendment rights. Nor is imposing this burden an efficient or reasonable use of the criminal justice system.

The problem has become particularly acute in recent years when legislators, faced with political and social pressures, pass statutes which they know are likely to be held unconstitutional, intentionally leaving it to the courts to make politically sensitive decisions. Particularly in light of such

political gamesmanship, the cost of striking down unconstitutional laws should not be imposed upon legitimate businesspersons.

ARGUMENT

I. THE RULING OF THE WASHINGTON SUPREME COURT THAT A PRE-ENFORCEMENT CHALLENGE TO AN UNCONSTITUTIONAL STATUTE CANNOT BE BROUGHT UNDER 42 U.S.C. § 1983 HAS NO SUPPORT IN THE CASES

Section 1983 of Title 42 of the United States Code grants redress to every person who under color of law is deprived of any rights, privileges or immunities secured by the Constitution and laws of the United States. The text of § 1983 nowhere requires that a plaintiff suffer an arrest before bringing a claim. This Court has consistently held that the existence of an unconstitutional state law, violative of the First Amendment, creates a cause of action under § 1983 in favor of persons who have a reasonable fear of the unconstitutional statute being enforced against them. Indeed, Justice Brennan emphatically rejected any arrest requirement in *Virginia v. American Booksellers*, a pre-enforcement action brought by some of the *amici* under 42 U.S.C. § 1983:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

484 U.S. at 393. *Cf. Garland Indep. Sch. Dist. v. Texas State Teachers Ass'n*, 479 U.S. 801 (1986) (summarily affirming a Fifth Circuit decision that granted relief under § 1983 despite a lack of enforcement).

Similarly, in *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), plaintiffs, including some of the *amici*, brought a pre-enforcement action to declare an Indianapolis ordinance unconstitutional under the First Amendment. There, as here, plaintiffs feared that the legislation would infringe upon their First Amendment rights. While in the present case there was "unchallenged" testimony of actual self-censorship by plaintiffs (A-18), in *Hudnut* a preliminary injunction was granted almost immediately, precluding the necessity for self-censorship. Nevertheless, a declaration of unconstitutionality was entered by the U.S. District Court under § 1983, affirmed by the Court of Appeals and this Court. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Legal fees were awarded to plaintiffs under 42 U.S.C. § 1988. *American Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986).

The Supreme Court of Washington cites no decision of this Court in support of its remarkable conclusion that a statute must actually have been enforced before plaintiffs who reasonably fear enforcement may challenge its constitutionality under 42 U.S.C. § 1983. There is none. Nor are there lower federal court decisions supporting this view. The only authorities cited by the Washington Supreme Court are five state court decisions (A-35, fn. 76). One of the cases, *Collier v. Tacoma*, 121 Wash. 2d 737, 854 P.2d 1046 (1993), has no bearing on the issue here because it involved a *post*-enforcement challenge to the constitutionality of an ordinance. Two others, *Jacobsen v. Seattle*, 98 Wash. 2d 668, 658 P.2d 653 (1983) and *Duranceau v.*

Tacoma, 37 Wash. App. 846, 684 P.2d 1311 (1984), also shed no light on this case. They involve constitutional challenges after state action occurred, absent any statutory challenge. The last two cases, *Rains v. State*, 100 Wash. 2d 660, 674 P.2d 165 (1983) (collateral estoppel) and *Ryder v. Port of Seattle*, 50 Wash. App. 144, 748 P.2d 243 (1987) (exhaustion of remedies) denied liability for reasons not relevant here, and therefore the courts never reached the issue of attorneys' fees.

None of these cases presented the opportunity to discuss, much less determine, whether a pre-enforcement action entitled the plaintiff to relief under § 1983 and attorneys' fees under § 1988. The fact that all of the successful, prior Washington cases involved enforcement does not mean that a cause of action fails to accrue under § 1983 absent enforcement, any more than, had the plaintiffs in those cases all been residents of Seattle, a cause of action would fail to accrue under § 1983 for residents of Spokane.

The ruling of the Washington Supreme Court as to the applicability of 42 U.S.C. to pre-enforcement suits is simply in error. A plaintiff need not seek arrest and bear the publicity of being branded an accused criminal to be relieved from the burdens of an unconstitutional statute. As this Court has stated in a comparable situation:

> the hapless plaintiff [need not be placed] between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel v. Thompson, 415 U.S. 452, 462 (1974) (citation omitted).

II. THE DECISION BELOW CONTRAVENES THE PURPOSE OF THE FEDERAL STATUTORY SCHEME GRANTING ATTORNEYS' FEES TO PERSONS BRINGING SUCCESSFUL PRE-ENFORCEMENT CONSTITUTIONAL CHALLENGES

It is expensive to litigate constitutional issues, and constitutionally-suspect legislation is not generally directed against the rich and powerful. Consequently, 42 U.S.C. § 1983 awards the cost of litigation, including attorneys' fees, to those plaintiffs who successfully mount challenges to unconstitutional litigation. As this Court stated earlier this year:

> Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees.

Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1028 (1994). This Court consistently has recognized the importance of protecting against the "chilling effect" on First Amendment rights of the mere threat of enforcement, resulting in self-censorship. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 392. Persons such as *amici* are vital to the maintenance of First Amendment freedom through the enforcement of civil rights laws:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases

> arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

The availability of §§ 1983 and 1988 is particularly important given the readiness of many law-makers, when subject to political and social pressure, to pass constitutionally-suspect legislation with the view - "let the courts find it unconstitutional.[1]" It is therefore important that §§ 1983 and 1988 be available for pre-enforcement challenges of unconstitutional legislation by plaintiffs having "an actual and well-founded fear" of enforcement.

Finally, it is not an efficient use of the criminal justice system to require solicited arrests to commence a constitutional challenge.

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[1] For example, Beulah Coughenour, a leading proponent on the Indianapolis City-County Council which promulgated the ordinance found unconstitutional in *American Booksellers Ass'n v. Hudnut, supra*, stated during hearings on the bill that the legislators were "not here to decide constitutionality" and that the City-County Council should "give a chance for the proposed legislation," whatever its deficiencies, to "have its day in Court." Hearing, Indianapolis City-County Council, Admin. Comm. (Apr. 16, 1984). *Amici* have heard similar statements regularly from legislators.

CONCLUSION

For the reasons set forth above, we respectfully urge that a writ of certiorari should issue to review and reverse the decision of the Supreme Court of the State of Washington as to attorneys' fees.

September 21, 1994

Respectfully submitted,

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